

1991

# State of Utah v. David C. Allen : Brief of Appellant

Utah Supreme Court

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Hon. R. Paul Van Dam; Attorney General; Attorney for Plaintiff/Respondent.

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IN

OF THE STATE OF UTAH

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STATE OF UTAH, :

PLAINTIFF/RESPONDENT :

V. :

DAVID C. AL :

DL :

SL NO. 910572

IT

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APPEAL FROM  
CONTROLLED SUBSTANCE  
IN VIOLATION OF UTAH  
FIRST DEGREE FELONY, ANN.  
WITHOUT TAX STAMPS  
ANN. TITLE 59-19-1  
SECOND JUDICIAL  
STATE OF UTAH, THE H

POSSESSION OF  
TO DISTRIBUTE,  
TITLE 58-37-8(1), A  
POSSESSION OF MARIJUANA  
SECTION OF UTAH CODE  
FELONY, IN THE  
DAVIS COUNTY  
CORNABY PRESIDING

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IN THE SUPREME COURT OF THE STATE OF UTAH

-----

STATE OF UTAH,	:	
PLAINTIFF/RESPONDENT	:	
V.	:	CASE NO. 910572
DAVID C. ALLEN,	:	PRIORITY NO. 2
DEFENDANT/APPELLANT	:	

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BRIEF OF APPELLANT

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APPEAL FROM CONVICTION OF POSSESSION OF  
CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE,  
IN VIOLATION OF UTAH CODE ANN. TITLE 58-37-8(1), A  
FIRST DEGREE FELONY, AND UNLAWFUL POSSESSION OF MARIJUANA  
WITHOUT TAX STAMPS AFFIXED, IN VIOLATION OF UTAH CODE  
ANN. TITLE 59-19-106, A THIRD DEGREE FELONY, IN THE  
SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY  
STATE OF UTAH, THE HONORABLE DOUGLAS L. CORNABY PRESIDING

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CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, FIFTH AMENDMENT.....2,3

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law: nor shall private property be taken for public use without just compensation.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT.....2,3

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed: which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

UTAH CONSTITUTION, ARTICLE 1, SECTION 7.....2

"No person shall be deprived of life, liberty or property, without due process of law."

IN THE SUPREME COURT OF THE STATE OF UTAH

-----  
STATE OF UTAH, :  
PLAINTIFF/RESPONDENT, :  
V. : CASE NO. 910572  
DAVID C. ALLEN, : PRIORITY NO. 2  
DEFENDANT/APPELLANT. :  
-----

-----  
BRIEF OF DEFENDANT/APPELLANT  
-----

JURISDICTION

This appeal is taken pursuant to the provisions of Rule 3 Title II, Utah Rules of Appellate Procedure and Utah Code Ann. Title 78-2a-2, in which Defendant/Appellant appeals his conviction from the Second Judicial District Court, Davis County, State of Utah.

NATURE OF PROCEEDINGS

This is an appeal from a conviction in which Defendant/Appellant was convicted of possession of a controlled substance with intent to distribute, in violation of Utah Code Ann. (UCA) 58-37-8(1), a felony of the first degree, and unlawful possession of marijuana without tax stamps affixed, in violation of UCA 59-19-106, a felony of the third degree.

STATEMENT OF ISSUES

The issues presented in this appeal are:

1. Was defendant denied the effective assistance of counsel?
2. Was the defendant denied his right to due process of law by being tried without his being present?

#### DETERMINATIVE AUTHORITY

##### UNITED STATES CONSTITUTION AMENDMENT 5

##### UTAH CONSTITUTION ARTICLE 1 SECTION 7

"No person shall be ... deprived of life, liberty, or property, without due process of law..."

##### UNITED STATES CONSTITUTION AMENDMENT 6

" In all criminal prosecutions the accused shall ... have the assistance of counsel for his defense."

#### STATEMENT OF THE CASE

On June 1, 1991, Defendant/Appellant was charged with possession of a controlled substance with intent to distribute (UCA 58-37-8, a first degree felony) and unlawful possession of marijuana without a tax stamp ( UCA 59-19-106 a third degree felony). Defendant was tried in his absence by a jury trial held the 5th day of September, 1991, before the Honorable Douglas L. Cornaby, Second District Court, Davis County, State of Utah.

A bench warrant for the defendants arrest was issued on the day of trial. Defendant was subsequently picked up on the warrant and on December 17, 1991, sentenced by the Court to the Utah State Prison for an indeterminate term of 0 to five years on the third degree felony and five years to life for the first degree felony. The terms are to be served concurrently.

#### STATEMENT OF FACTS

Members of the Davis County Metro Strike Force, working on tips received from a confidential informant, Rita Renee Walker, learned that the defendant was interested in purchasing

methamphetamine and marijuana.

On June 1, 1991, strike force officers contacted the defendant and made arrangements for the defendant to purchase marijuana.

Late in the evening on the 1st of June, Craig Bitton, a friend of the defendant, along with the defendant and Rita Walker, met at Ms. Walker's home. Strike force undercover officers arrived at the home, and after confirming that the defendant brought the money previously agreed to, took the defendant to the Sunset 7-11 store where the marijuana was to be picked up.

The marijuana was brought to the store by other undercover officers and it was given to the defendant.

The defendant did not appear for trial and was tried by a jury in his absence. Prior to the commencement of the trial, defendant's counsel made a request for a continuance, but the motion was denied.

Further, during the trial defendant's counsel failed to object to testimony of defendant's prior prison term.

#### SUMMARY OF ARGUMENT

The trial court erred in not granting the defendant's motion to continue the trial until the defendant was present. By having the trial in the defendant's absence he was denied due process as guaranteed by the fifth amendment to the United States Constitution and by the Utah State Constitution.

Further, the right to counsel as guaranteed by the sixth amendment means the defendant had right to adequate counsel. Defendant's counsel was "inadequate" by failing to object to



testimony of the defendant's prior prison term.

## ARGUMENT

### POINT I

DEFENDANT WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS DEFENDANT'S COUNSEL FAILED TO OBJECT TO TESTIMONY OF DEFENDANT'S PRIOR PRISON TERM.

The defendant has asked his appeal counsel to argue that his trial attorney was inadequate because testimony was allowed during the trial regarding defendant's prior criminal conviction.

Specifically, during the testimony of Rita Walker, she was asked by defendant's counsel, "how are you aware of that?" and Ms. Walker answered, "Umm, because of the fact that his girl friend, Debra Nelson, while Dave was in prison before he got out in August of last year set up a deal." (transcript page 32, lines 20-23)

Defendant's counsel made an objection, but then allowed the witness to go on with her testimony without allowing the court to make a ruling. ( transcript page 32, lines 24-25, page 33, line 1)

Mike Murphy: objection.

The witness: what?

Mike Murphy: Go ahead

Further, this same type of testimony regarding the defendant's previous prison sentence was allowed at a later time during the trial. When the State's attorney was examining Lon F. Brian, a member of the Strike Force, the following answer was not objected to:

Question: What happened when you arrived there?

Answer: As soon as I arrived, I was taken into the living room where Mr. Allen was sitting. I was introduced to Mr. Allen. Mr. Allen passed--started to bring out--so that there would be an introduction, Rita told me where she had known him from. And then

Mr. Allen took over and told me that he had been in prison, that he had contacts such as that. (transcript page 42, lines 3-9)

Because of counsel's failure to make proper objections, the trier of fact received information about defendant's prior prison commitment. This information would not have been properly admitted into evidence during the State's case in chief, and was unduly prejudicial. As stated in State v. Humphries, 171 Utah Adv.Rep.7, "No sound course of trial strategy could dictate defense counsel to be silent at such a critical time. We conclude that there is a reasonable likelihood of a result more favorable to defendant if his trial counsel had not remained silent."

#### POINT II.

DEFENDANT WAS TRIED IN HIS ABSENCE AND THEREFORE WAS DENIED HIS RIGHT TO DUE PROCESS.

Defendant was tried over the objection of his attorney, as the Court denied counsel's motion for a continuance. (transcript page 6, lines 20-22).

Because of the Court's denial of the motion for the continuance, defendant was not present to aid his counsel during the trial. Specifically, the defendant was denied the opportunity of giving counsel information during the trial, to confront the witnesses, as well as the opportunity of taking the witness stand in his own defense.

It is a well established principle that due process of law, as guaranteed by the fifth amendment to the constitution and the Utah constitution, means that the defendant in a criminal matter will be

treated fairly. Here, the court's denial of continuing the case unduly tipped the scales in favor of the State.

#### CONCLUSION

Based on the above discussion, the Defendant respectfully asks this Court to set aside the Defendant's conviction.

Respectfully submitted this 15th day of June, 1992.

William J. Albright  
Attorney for Defendant/Appellant

#### CERTIFICATE OF MAILING

I hereby certify that I have thoroughly reviewed the file and have read the transcripts and that I have raised the points/issues requested by the defendant in this brief and that on the 15th day of January, 1992, I mailed, postage prepaid, a true and correct copy of the above brief and a copy of the transcript to David C. Allan at the following address:

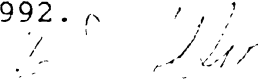
David C. Allen  
Utah State Prison  
Draper, Utah 84020

CERTIFICATE OF HAND DELIEVERY

I, William J. Albright, hereby certify that I hand delievered four true and correct copies of the foregoing Brief of Defendant/Appellant to the:

Criminal Appeals Division  
Utah Attorney General  
236 State Capitol  
Salt Lake City, Utah

Dated this 15th day of June, 1992.

  
\_\_\_\_\_

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
IN AND FOR THE  
COUNTY OF DAVIS, STATE OF UTAH

---

STATE OF UTAH,	:	
Plaintiff,	:	MINUTE ENTRY
vs.	:	December 17, 1991
DAVID C. ALLAN,	:	Case No. 911707299
Defendant.	:	

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Douglas L Cornaby, Judge  
Kelly Hicken, Reporter  
Kathy Potts, Clerk

This matter comes before the Court for Sentence. Carvel Harward is present as counsel for the plaintiff. The defendant is present and represented by Michael Murphy.

Mr. Murphy makes statements to the Court. The defendant makes statements to the Court.

On count one, the defendant is sentenced to the Utah State Prison for an indeterminate term of 5 years to life, fined \$10,000 and ordered to pay a drug assessment fee in the amount of \$150. On count two, the defendant is sentenced to the Utah State Prison for an indeterminate term of 0 to 5 years and fined \$5,000. The terms are to be served concurrently.

RECORDED

DEC 20 1970

91-788

IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH, )

Plaintiff, )

vs. )

David Charles Allan, )

Defendant. )

SENTENCE

Criminal No. 91170  
7249

Count One: dist.  
Charge No. 1 Poss. of 1st intent to, (felony), (degree 1st)  
(~~misdemeanor~~), (class           ).

12-17-91 (Prison) Sentence: The Defendant is sentenced to the Utah State Prison for an indeterminate term of 5 yrs. to years, life fined \$ 10,000, plus a surcharge of \$           , ordered to pay restitution in the amount of \$            to            and a drug assessment fee of \$ 150.

(Jail) Sentence: The Defendant is sentenced to the Davis County Jail for a term of            (days)(months)(year), fined \$           , plus a surcharge of \$           , ordered to pay restitution in the amount of \$            to            and a drug assessment fee of \$           .

The following special conditions are ordered:

- The (prison)(jail) term is stayed on satisfactory completion of probation.
- The defendant is ordered to spend            (days) (months)(year) in the Davis County Jail.
- All but \$            of the fine is suspended on satisfactory completion of probation.
- The defendant is ordered to spend            (days) (months) (as long as required) in

Count Two:            halfway house or drug treatment house.  
Charge No. 2 Unlawful Poss. of Marijuana, (felony), (degree 3rd)  
(~~misdemeanor~~), (class           ).

12-17-91 (Prison) Sentence: The Defendant is sentenced to the Utah State Prison for an indeterminate term of 0-5 years, concurrent fined \$ 5,000, plus surcharge of \$           , ordered to pay restitution in the amount of \$            to            and a drug assessment fee of \$           .

(Jail) Sentence: The Defendant is sentenced to the Davis County Jail for a term of            (days)(months)(year), fined \$           , plus surcharge of \$           , ordered to pay restitution in the amount of \$            to            and a drug assessment fee of \$           .

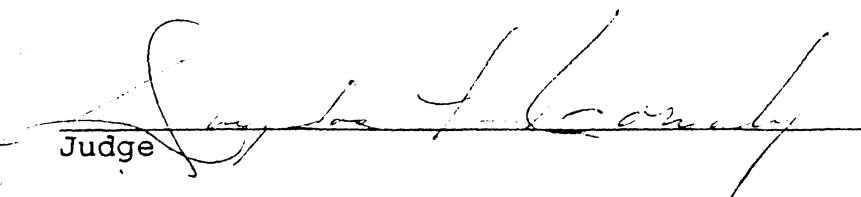
\_\_\_\_\_ The following special conditions are ordered:

- \_\_\_\_\_ a. The (prison)(jail) term is stayed on satisfactory completion of probation.
- \_\_\_\_\_ b. The defendant is ordered to spend \_\_\_\_\_ (days) (months)(year) in the Davis County Jail.
- \_\_\_\_\_ c. All but \$\_\_\_\_\_ of the fine is suspended on satisfactory completion of probation.
- \_\_\_\_\_ d. The defendant is ordered to spend \_\_\_\_\_ (days) (months) (as long as required) in \_\_\_\_\_ halfway house or drug treatment house.

\_\_\_\_\_ Defendant placed on probation on the following terms and conditions:

- \_\_\_\_\_ a. Fine is to be paid through the Clerk of the Court.
- \_\_\_\_\_ b. Restitution is to be paid through the Clerk of the Court.
- \_\_\_\_\_ c. No violations of law.
- \_\_\_\_\_ d. No consumption of alcohol or alcoholic beverages
- \_\_\_\_\_ e. No use or possession of controlled substances
- \_\_\_\_\_ f. Submit to search of person, premises or vehicles and seizure of any evidence without a search warrant at the request of a probation officer or police officer.
- \_\_\_\_\_ g. Submit to body fluids testing upon request.
- \_\_\_\_\_ h. No association with known drug users.
- \_\_\_\_\_ i. No association with (co-defendants)(victims).
- \_\_\_\_\_ j. Enter and complete mental health counseling.
- \_\_\_\_\_ k. Enter and complete alcohol & drug treatment program.
- \_\_\_\_\_ l. Maintain full time employment.
- \_\_\_\_\_ m. Become involved in an educational/vocational training program.
- \_\_\_\_\_ n. No living with a person of the opposite sex without being married.
- \_\_\_\_\_ o. (Other) \_\_\_\_\_

\_\_\_\_\_ The Defendant is ordered to pay \$\_\_\_\_\_ to the Clerk of the Court on or before the first Tuesday of each month beginning in the month of \_\_\_\_\_ 19\_\_\_\_, or appear in court on the first Tuesday of any month at 9:00 A. M. when a payment is due and not paid.

  
Judge